INTEREST OF *AMICI CURIAE*

The States have a compelling interest in preserving the sovereign right to use tax incentives to encourage businesses to locate and invest within their borders. Tax incentives are crucial to the States' ability to compete in the global marketplace and to attract investment to economically depressed areas. Indeed, if States are no longer free to encourage in-state economic activity through tax incentives, their ability to compete in the global marketplace and to cultivate development in economically depressed areas will be crippled. These incentives do not violate the dormant Commerce Clause so long as they do not burden out-of-state economic activity or impede the free flow of commerce.

The States also have an interest in preserving the constitutional and prudential standing limitations on plaintiffs seeking to voice generalized grievances, directed at a State's taxing and spending decisions, that are common to all members of the public or citizens of a State. If citizens of a State were granted standing in federal court to challenge state expenditures without demonstrating a concrete, particularized injury, the ability of the States to govern would be seriously impeded. The political branches of State and Federal government are the proper venues to address such grievances.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision should be vacated since it should never have been adjudicated in federal court and it is wrong on the merits.

This case should never have been adjudicated in federal court because each of the Respondents lacks standing to challenge Ohio's investment tax credit. The constitutional minimum for standing requires a showing that the plaintiff has suffered or will imminently suffer an "injury in fact" that is both "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical," and it must be "likely, as opposed to merely speculative," that the injury will be redressed by a favorable decision. The Respondents who are Ohio citizens whose only injury results from their status as Ohio taxpayers, have not alleged an injury that is sufficiently particularized to satisfy the "injury in fact" prong of the constitutional standing test. The Respondents who are Michigan citizens whose claims of reduced employment opportunities and loss of indirect benefits that they would have received, indirectly, from state and local governments if a DaimlerChrysler facility had located in Michigan, cannot satisfy either the "injury in fact" or "redressability" prongs of the test. The only remaining respondent, Kim's Auto and Truck Service, Inc. ("Kim's Auto"), an Ohio corporation slated for displacement as a result of increased economic activity in Ohio, does not allege an interest within the zone of interests regulated by the Commerce Clause.

This case was wrongly decided on the merits because tax credits merely designed to influence location decisions do not for that reason violate the dormant Commerce Clause. The purpose of the dormant Commerce Clause is to prevent the States from protecting local industry from market forces by erecting structural barriers to the free flow of commerce. Accordingly, a state tax or regulation only violates the dormant Commerce Clause if it denies the citizens of a state free access to a market

or it discriminates against products manufactured or business operations performed in another state. The investment tax credit invalidated by the Sixth Circuit did neither. Its purpose and only effect was "to encourage the growth and development of intrastate commerce and industry," something this Court has described as a "laudatory goal." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385-86 (1991).

Furthermore, investment tax credits should not be held to violate the dormant Commerce Clause if they are equivalent to pure subsidies in purpose and economic effect. Pure subsidies funded out of a state's general revenue do not burden interstate commerce, but merely assist local business. Analogous tax incentives in the form of tax credits are no more discriminatory than subsidies as long as they do not penalize businesses for products manufactured or operations performed out-of-state.

ARGUMENT

I. Respondents lack standing.

The "irreducible constitutional minimum" for standing requires a showing that the plaintiff has suffered an "injury in fact" that is "fairly traceable" to the actions of the defendant, and that is "likely [to] be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotations and alterations omitted). Additionally, a plaintiff must satisfy the requirements for prudential standing, which encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches," and, of particular relevance in this case, "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2309 (2005) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). As developed below, each of the Respondents lacks either Article III standing or prudential standing to challenge Ohio's investment tax credit.

a. The Ohio Taxpayers failed to allege a sufficiently particularized injury.

The Ohio Taxpayers' sole injury results from their status as state taxpayers—they claim that Ohio's investment tax credit "depletes the funds of the State of Ohio to which [they] contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on [them]." Complaint, ¶ 40. This injury, shared by virtually all Ohio state taxpayers, is not an "injury in fact."

An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (internal citations omitted). To be "particularized," "the

injury must affect the plaintiff in a personal and individual way," *id.* at 560 n.1, as opposed to an undifferentiated, "generalized grievance" that is "common to all members of the public," *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

A plaintiff cannot meet the particularized injury requirement, outside the Establishment Clause context, based solely on his status as a federal taxpayer. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). Suits premised on federal taxpayer status are not cognizable in federal court because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.*; *see also Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (holding that federal taxpayer status is sufficient to confer standing only when the taxpayer directly challenges an exercise of Congress's taxing and spending power and "show[s] that the challenged enactment exceeds specific constitutional limitations upon the exercise of [that] power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8"); *id.* at 114 (Stewart, J., concurring) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'"); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 477-79 (1982); *United States v. Richardson*, 418 U.S. 166, 173-74 (1974); *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433-34 (1952); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-479 (1938).

At least five members of the present Court have written or joined in opinions recognizing that state taxpayers, like federal taxpayers, ordinarily lack federal standing. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612-18 (1989) (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, J.J.) (applying *Frothingham* direct injury requirement in concluding that a state taxpayer claim brought in state court would have been dismissed if it had been brought in federal court for lack of Article III standing); *Nike, Inc. v. Kasky*, 539 U.S. 654, 669 (2003) (Breyer, J., joined by O'Connor, J., dissenting) (commenting that state taxpayers "ordinarily lack federal 'standing'"). In *ASARCO*, Justice Kennedy wrote for a plurality that a group of state taxpayers and a teacher's association would have lacked Article III standing to challenge the validity of an Arizona law governing mineral leases on state lands had they brought their challenge in federal court. *ASARCO*, 490 U.S. at 617-18. Quoting *Frothingham*, Justice Kennedy explained that, "[a]s an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts," and that the Court "ha[d] likened state taxpayers to federal taxpayers, and thus . . . refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." *Id.* at 613-14.

Virtually every circuit to address the "state taxpayer standing" issue post-*ASARCO* has similarly concluded that state taxpayer status is insufficient to confer Article III standing.[1] *See*

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[1] The notable exception is *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), in which a Ninth Circuit panel held that plaintiffs' status as Hawaiian taxpayers was sufficient to confer standing to raise equal protection and due process challenges to a Hawaiian agency's appropriations of state tax revenue. *Id.* at 969. The decision in that case applied pre-*ASARCO* circuit precedent, without significant analysis, which held that state taxpayers had standing to seek to enjoin a state's "'appropriating, transferring, and spending' of taxpayers' money from the state treasury's general fund." *Id.* at 968 (quoting *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984)). The court explained that, notwithstanding Justice Kennedy's plurality opinion in *ASARCO*, "[o]ur

Tarsney v. O'Keefe, 225 F.3d 929, 938 (8th Cir. 2000); *Coyne ex rel. Ohio v. American Tobacco Co.*, 183 F.3d 488, 494-95 (6th Cir. 1999); *Board of Educ. v. New York State Teachers Retirement Sys.*, 60 F.3d 106, 110-11 (2d Cir. 1995); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943-44 (11th Cir. 2003) (recognizing that "state taxpayers [ordinarily] lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general"). Several of these courts recognized that, in addition to gutting the "injury in fact" prong of the Article III standing test, a contrary holding would raise serious federalism concerns. A state taxpayers' attack on state spending in federal court implicates "the integrity of our federal government's structure." *Colorado Taxpayers Union*, 963 F.2d at 1403 (quoting *Hoohuli*, 741 F.2d at 1183 (Wallace, J., dissenting)); *accord, e.g., Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988). "If taxpayers were granted standing to challenge state expenditures without demonstrating a direct injury, the ability of states to govern could be seriously impeded." *Tarsney*, 225 F.3d at 938 (noting that if state taxpayer status conferred federal standing, state taxpayers "could sue on the basis of religious beliefs to challenge state funding for executions, stem cell research, civil unions, or various civil rights laws"); *accord Colorado Taxpayers Union*, 963 F.2d at 1403 (noting state taxpayer standing "could unduly constrict experimental state welfare legislation and undermine local self-determination.").

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decision in *Hoohuli* remains the law of the circuit until our court, sitting en banc, overrules it, or until the Supreme Court, *in a majority opinion*, plainly undermines its principles." *Id.* at 969 (emphasis added). Of course, *Arakaki* and *Hoohuli* appear irreconcilable with another Ninth Circuit decision, *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991), in which a Ninth Circuit panel cites *ASARCO* and expressly states that "[t]he same constitutional standing principles [applicable to federal taxpayers] apply to those suing in federal court as state taxpayers." *Id.* at 1423.

The Article III "particularized injury" requirement precludes taxpayers from "employ[ing] a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *See Flast*, 392 U.S. at 106. For the reasons identified by the plurality in *ASARCO*, and in subsequent decisions of the Second, Sixth, Eighth, and Tenth Circuits, this Court should hold that the constitutional limitations on "taxpayer standing" in federal court are no less applicable when a party challenges a state's taxing and spending decisions than when a party challenges Congress's taxing and spending decisions.

b. The Michigan Plaintiffs failed to allege a sufficiently concrete or redressable injury.

The Michigan Plaintiffs claim that, "[i]f the [DaimlerChrysler facility] had . . . been located in Michigan, [it] would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan." Complaint, ¶ 42. These claims of potential lost revenue and economic opportunities are insufficiently concrete and too speculative to constitute an "injury in fact."

An "injury in fact" "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury to the plaintiff must be "'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (internal citations omitted). Moreover, the plaintiff must further establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations omitted).

The Michigan Plaintiffs allege two general injuries resulting from DaimlerChrysler's locating decision, neither of which satisfies the concreteness or redressability requirements for Article III standing. The Michigan Plaintiffs' first claim is that they would have benefitted from increased employment

opportunities had DaimlerChrysler located in Michigan. Complaint, ¶ 42. However, the Complaint offers nothing to suggest that any of the Michigan Plaintiffs would have personally been eligible for a qualitatively better job at a new DaimlerChrysler facility in Michigan. "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Because "the 'injury in fact' test . . . requires that the party seeking review be himself among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972), *quoted in Lujan*, 504 U.S. at 563, general increases in employment opportunities cannot confer Article III standing in the absence of allegations of an individualized impact. In any event, it is "merely speculative" as opposed to "likely" that any of the Michigan Plaintiffs would personally be eligible for a better job as a result of a favorable decision in this case. *See Lujan*, 504 U.S. at 561.

The Michigan Plaintiffs' other alleged injury—that they would benefit as a result of "certain tax revenues to the benefit of certain [unnamed] local governments and the State of Michigan," Complaint, ¶ 42—is even less concrete and less likely to be redressed by a favorable decision in this case. They do not allege that their state or local taxes will be reduced or that additional benefits will be available to them. Moreover, they do not allege any particularized injury that would differentiate any of their injuries from those of any other taxpayer. *See ASARCO*, 490 U.S. at 613-14 (commenting that the Court had "likened state taxpayers to federal taxpayers, and thus . . . refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." *Id.* at 613-14; *see also* discussion *supra* § I.a. Even more importantly, the Michigan Plaintiffs fail to explain how additional revenue flowing to "certain local governments and the State of Michigan" will necessarily inure to their benefit. Thus, their injury is entirely

speculative because it depends on whether the state and local governments described in the Complaint would pass through some of the benefits received as a result of a new DaimlerChrysler facility.

c. Kim's Auto failed to allege an injury within the zone of interests protected by the dormant Commerce Clause.

Kim's Auto, an Ohio corporation which alleges in the Complaint that it was slated for displacement as a result of the DaimlerChrysler expansion, *see* Complaint, ¶ 41, lacks prudential standing. Prudential standing is lacking unless "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970), *quoted in Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987). Kim's Auto's interest in this litigation is not within the zone of interests regulated by the dormant Commerce Clause.

The purpose of the Commerce Clause is to ensure "that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them[, and that] every consumer may look to free competition from every producing area in the Nation to protect him from exploitation by any." *Dennis v. Higgins*, 498 U.S. 439, 449-50 (1991) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). Accordingly, its negative implications "prohibit[] economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988), "laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent,"

C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (1994); *see also Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 499 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005).

Thus a market participant alleges an injury within the zone of interests protected by the Commerce Clause if he alleges that a state has denied him free access to a market, and a consumer falls within the zone of interests protected by the Commerce Clause if he alleges that a state has imposed barriers to free competition resulting in economic exploitation. *Compare Oxford Assocs. v. Waste Sys. Auth.*, 271 F.3d 140, 146-47 (3d Cir. 2001) (holding plaintiff building owners had standing to challenge municipal waste authority's coercive fee structure designed to benefit a particular waste treatment plant because "as consumers of waste processing services, [they were] within the zone of interests intended to be protected by the Commerce Clause"); *with Nat'l Solid Waste Mgmt. Ass'n*, 389 F.3d at 499-500 (holding municipalities and waste authority lacked prudential standing to facially attack allegedly discriminatory waste management ordinances under dormant Commerce Clause because "[their] injury is not related to any out-of-state characteristic of their business"). By contrast, a local business displaced by expanding intrastate economic activity is not injured in a manner the dormant Commerce Clause was intended to guard against.

Kim's Auto claims to be displaced by in-state economic expansion. It does not allege that Ohio has denied it free access to a market or has otherwise imposed barriers to free competition. Injuries to in-state economic interests due to tax incentives designed to benefit in-state economic interests are not within the zone of interests the dormant Commerce Clause was intended to prevent. Accordingly, Kim's Auto lacks prudential standing to proceed with this case in federal court.

II. Ohio's investment tax credit does not violate the dormant Commerce Clause.

a. Tax credits do not violate the dormant Commerce Clause unless they burden the free flow of commerce.

"[T]he Framers intended the Commerce Clause as a cure for [Confederation-era] structural ills," specifically, the early States' use of "state taxes and duties [that] hindered and suppressed interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *see also Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."), *quoted in Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997). Up to this point, this Court has interpreted the dormant Commerce Clause in a manner consistent with its original goal—i.e., to limit the States' ability to favor local industry through protectionist measures that inhibit the free flow of commerce. Accordingly, the antidiscrimination principle implicit in the Commerce Clause has only been held to preclude the States from "discriminatorily tax[ing] the products manufactured or the business operations performed in any other State." *Boston Stock Exch.*, 429 U.S. at 337, *quoted in Armco, Inc. v. Hardesty*, 467 U.S. 638, 646 (1984).[2]

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[2] Alexander Hamilton's personal involvement with state tax subsidization may provide some insight into his belief as to the scope of the Commerce Clause as it was originally intended. In 1791, while serving as the first Secretary of the Treasury, Hamilton organized a group of investors and requested the New Jersey Assembly pass legislation incorporating the Society for Establishing Useful Manufactures (the "Society"). The legislation would encourage the Society's activity in New Jersey, in part,

The Sixth Circuit's decision unties the dormant Commerce Clause principle from its constitutional moorings. The "very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exch.*, 429 U.S. at 328 (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)); *see also West Lynn Creamery v. Healy*, 512 U.S. 186, 207 (1994) (Scalia, J., concurring) ("The purpose of the negative Commerce Clause, we have often said, is to create a national market."); *C & A Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism . . . "). It follows then that the Commerce Clause only prohibits state action *inhibiting free trade. See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) ("The precise issue is . . . do the [state's taxing mechanisms] discriminate against some participants in interstate commerce *in a way that contradicts the central purpose of the Commerce Clause?*") (emphasis added).

The tax credit invalidated by the Sixth Circuit imposed no burden on free trade—it did not "deprive citizens [of any State] of their right to have access to the markets of other States on equal terms," *Granholm v. Heald*, 125 S. Ct. 1885, 1896

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by providing "that all lands, tenements, heriditaments, goods . . . to the said society belonging, shall be, and they are hereby declared to be free, and exempt, from all taxes charges and impositions whatsoever, under the authority of this State, whether for State or for county uses. . . . " William Paterson, The Charter of the Society for Establishing Useful Manufactures, Laws of New Jersey, revised and published under the authority of the Legislature, 1800, § IV. The legislation gave the Society a state tax exemption, the power to condemn property for its own use, and control over a significant portion of the northern New Jersey water supply. This led to the establishment of the nation's first industrial park. Peter K. Eisinger, The Rise of the Entrepreneurial State 15 (The University of Wisconsin Press 1988). It seems unlikely that Hamilton would have encouraged New Jersey to enact this legislation if he believed its constitutionality was suspect.

(2005), or "discriminatorily tax the products manufactured or the business operations performed in any other State," *Boston Stock Exch.*, 429 U.S. at 337; *see also* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 St. Tax Notes 189, 192 (2005) (noting that this Court has only invalidated tax credits "for the performance of an in-state business activity, such as manufacturing, selling, or services) (footnotes omitted). The credit is only tangentially tied to economic activity because it encourages businesses to invest within Ohio without otherwise encouraging in-state, or discouraging out-of-state, economic activity.

This Court has never suggested the Commerce Clause precludes States from influencing a business's capital acquisition decisions through subsidization or investment tax credits. To the contrary, the Court has made clear that "States are free to 'structure their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. at 385-86 (1991) (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). Indeed, the Court has described it as "a laudatory goal" for a State to design its tax system in a manner that will "promote investment" for the purpose of "provid[ing] jobs and prosperity" for its citizens. *Trinova Corp.*, 498 U.S. at 385. The investment tax credit struck down by the Sixth Circuit did just that and nothing more.

The purpose of Ohio's investment tax credit was undoubtedly to encourage economic investment in specific zones within Ohio. However, "the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, *but only action of that description in connection with the State's regulation of interstate commerce.*" *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis added). Moreover, this Court has repeatedly made clear that a State's encouragement of in-state economic investment, *even its*

competition with other States for economic investment, does not constitute regulation of interstate commerce. While regulation of interstate commerce, if discriminatory, is prohibited by the dormant Commerce Clause, competition between states "for a share of interstate commerce . . . *lies at the heart of a free trade policy*." *Boston Stock Exch.*, 429 U.S. at 336-37 (emphasis added), *quoted in Armco, Inc. v. Hardesty*, 467 U.S. 638, 646 (1984), *and in Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 n.12 (1984); *see also* Firestone, *supra*, at 197 ("The dormant Commerce Clause does not require a state to use its tax laws to subsidize investment in another state merely because it reduces the cost of doing business in its own state. . . . [S]uch incentives encourage new business to enter the state and compete with existing local businesses, promoting, rather than hindering, interstate commerce.").

The dormant Commerce Clause prevents States from imposing barriers to free trade. It does not prevent the States from competing with each other for economic investment. Accordingly, the States are free to design their tax systems in a manner that will "promote investment" for the purpose of "provid[ing] jobs and prosperity" for their citizens. *Trinova Corp.*, 498 U.S. at 385. So long as a State's tax system does not restrain the free flow of commerce by (1) "depriv[ing] citizens [of a State] of their right to have access to the markets of other States on equal terms," *Granholm*, 125 S. Ct. at 1896, or (2) "discriminatorily tax[ing] the products manufactured or the business operations performed in any other State," *Boston Stock Exch.*, 429 U.S. at 337, it does not violate the dormant Commerce Clause.

b. Tax credits do not violate the dormant Commerce Clause if they are equivalent to pure subsidies in purpose and effect.

"[D]irect subsidization of domestic industry does not ordinarily run afoul" of the dormant Commerce Clause. *Id.*; *see Fireside Nissan v. Fanning*, 30 F.3d 206, 216 (1st Cir. 1994) ("[S]tates may directly subsidize local industry as long as they do so without burdening the ability of interstate competitors to sell their products in the state."). "A pure subsidy funded out of general revenue *ordinarily imposes no burden on interstate commerce, but merely assists local business.*" *West Lynn Creamery*, 512 U.S. at 199 (emphasis added); *see also C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (striking down ordinance that required all solid waste generated in respondent town to pass through its solid waste facility, but recognizing that the town could have "subsidize[d] the facility through general taxes or municipal bonds"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("[The Commerce Clause does not] inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); Firestone, *supra*, at 196 ("The Court has nowhere said that a state cannot structure its taxes to reduce the cost of doing business locally or to give a boost to the local economy. . . . As long as a state tax provision does not discriminate, the dormant Commerce Clause does not go so far as to require a state legislature to subsidize the economic development of another state in activities in which it has no sovereign interest.") (footnote omitted).

Clearly, there would have been no dormant Commerce Clause implications if Ohio had subsidized the DaimlerChrysler expansion without using its tax system. The only question then is whether an investment tax credit should be treated differently

even though "the real-world impact of [the] subsidy mirrors the effect of the credit." Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 835 (1996).

The Sixth Circuit concluded that there was a bright-line distinction between subsidies and tax credits, for purposes of Commerce Clause analysis, that "results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). However, the investment tax credit at issue here had no greater extraterritorial effects than an analogous subsidy. The investment tax credit merely sought to reward businesses for investing in Ohio with even greater rewards for businesses investing in designated special needs areas within the State. More importantly, the amount of the credit was tied exclusively to the amount a business invested in Ohio and where in Ohio the investment was made—the credit did not penalize businesses for operations conducted out-of-state.

The purely formalistic distinction between tax credits and subsidies drawn by the Sixth Circuit makes little sense in this context. In order to violate the dormant Commerce Clause, the challenged regulatory measure must be "designed to benefit in-state economic interests *by burdening out-of-state competitors*." *New Energy*, 486 U.S. at 473 (emphasis added); *see also Westinghouse*, 466 U.S. at 407 n.12 ("We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted [in-state]."). The reason pure subsidies generally do not burden interstate commerce is that they "merely assist[] local business," *West Lynn Creamery*, 512 U.S. at 199, i.e., they benefit in-state economic interests without burdening out-of-state competitors. Tax incentives designed to "merely assist local business" without penalizing out-of-state interests are no more discriminatory than analogous subsidies.

c. States frequently must use incentives to compete with foreign nations for economic investment.

Respondents' argument that federal court intervention is necessary to "save the States from themselves"[3] from what they see as a principally interstate "race to the bottom" dramatically oversimplifies what is truly a global marketplace for economic investment. Foreign nations, just as the United States, regularly use location-based tax incentives. *See, e.g.*, Robert J. Rolfe & Richard A. White, *Investors' Assessment of the Importance of Tax Incentives in Locating Foreign Export-Oriented Investment: An Exploratory Study*, 14 J. Am. Tax'n Ass'n, 39, 40 (1992) (noting that tax incentives are used by more than 70 countries); 151 Cong. Rec. S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("As a former Governor who had to compete against Japan, Canada, China and Europe for new business projects, I know just how important a role tax incentives can play in attracting new businesses."); *cf. Economic Development and the Dormant Commerce Clause: the Lessons of Cuno v. Daimler Chrysler and Its Effect on State Taxation Affecting Interstate Commerce: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. (May 24, 2005) (hereinafter *Hearings*) (testimony of Bruce Johnson, Lieutenant Governor of Ohio) (testifying that Ohio competes for economic investment with Canada, Mexico, and nations in Asia). Accordingly, a decision by this Court prohibiting the States from utilizing these tools would constitute unilateral disarmament of the United States in the global competition for new investment.

Canada is a major source of competition for economic investment in a number of industries, *see, e.g.*, Mark Anderson, *Twin Cities Face Stiff Competition in Luring Biotechs*, Finance

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[3] *See generally* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377 (1996).

& Commerce, July 2, 2003 (describing biotech industry study which identified Montreal, Toronto, and Vancouver as among the most affordable cities to locate new labs and plants); JoAnne Napier-Chaisson, *Inventive Incentives*, *available at* http://www.canadafocus.com/2003/sec04.htm (describing competitive advantages of Canadian provinces and identifying Canadian tax incentives offered in biopharmaceutical and information and communication technology industries), and investment tax incentives have been frequently employed by Canadian provinces to gain a competitive advantage over the United States. For example, Quebec has utilized tax incentives "to transform itself into a highly attractive location . . . to build manufacturing plants and conduct biopharmaceutical research." Napier-Chaisson, *supra*; *see id.* (quoting Francis Fox, executive with Rogers AT&T Wireless, identifying, as the source of Montreal's success, that "Montreal offers the best tax credits on the Eastern Seaboard").

Ontario has had similar success in the film industry, luring filmmakers away from the United States through tax incentives. *See, e.g.*, Jennifer Grzeskowiak, *Waving some cash in Hollywood's direction*, American City & County, Sept. 2005, at 22; *Come play with me*, Economist, Apr. 16, 2005, at 29 (identifying Canada as "a haven for so-called 'runaway production'"); Barney Gimbel, *Skip Canada, Shoot Here*, Fortune, Apr. 4, 2005, at 32. "Canada has proved a major thorn for the New York and Los Angeles entertainment communities, drawing production away from the United States." Roger Armbrust, *Ontario Pushes for Film Credits*, Back Stage, Dec. 17, 2004, at 4. Between April 2003 and March 2004, $1.9 billion in foreign projects were filmed in Canada, and States have begun offering similar incentives to lure projects back to the United States. *See* Grzeskowiak, *supra*, at 22-23 (quoting Alex Schott, director of Lousiana Governor's Office of Film and Television Development, commenting that Louisiana enacted filmmaking tax incentives in 2002 in order to "duplicate

Canada's success"); Gimbel, *supra*, at 32; Richard A. Webster, *Filmmakers keep rolling into state to cash in on tax incentives*, New Orleans City Business, Dec. 27, 2004, at 31 (quoting Schott, stating that developing infrastructure and labor force have not been substantial hurdles in movie industry growth in Louisiana because "[t]he production companies realize we're where Canada was 12 years ago").

In the microelectronics industry, American jobs are being lost to China and other Asian nations. In April 2005, George Scalise, President of the Semiconductor Industry Association, testified before the U.S. China Economic and Security Review Commission that America's dominance in the semiconductor industry has been gradually eroding over the last decade largely due to differences in tax policy and subsidization between Asian nations and the United States. *China's High Technology Development, Hearing Before the U.S. China Econ. & Sec. Review Comm'n* (Apr. 21, 2005), http://www.uscc.gov /hearings/2005hearings/written_testimonies/05_21_22wrts /scalise_george_wrts.pdf (testimony of George Scalise). According to Scalise, there is a "$1-plus billion 10-year cost difference" between building and operating a new facility in Asia versus the United States. *Id.* at 2. Scalise attributed about 10% of the cost differential to reduced labor costs, 20% to capital grants, and 70% to tax benefits. *Id.* Scalise noted that States that have succeeded in retaining facilities or attracting new facilities have attempted to level the playing field with foreign nations through, *inter alia*, "sales tax exemptions for machinery and equipment, property tax caps, [research and development] tax credits, business tax apportionment and ad valorem tax abatements." *Id.* at 8.

Last year, Portland, Oregon was the lone Western Hemisphere competitor for a 300-mm silicon wafer plant set to be constructed by Siltronic Corp., a German semiconductor manufacturer. *See* News Release, Portland Development Comm'n, *Portlant Emerges as One of Five Sites Considered for*

New Siltronic Plant, May 5, 2004, *available at* http://www.pdc.us/new/releases/20040506.asp; Jack Lyne, *Portland Raising Subsidies in Global Skirmish for Siltronic's 300-mm. Plant*, The Site Selection Online Insider, Nov. 2004, http://www.conway.com/ssinsider/incentive/ti0411.htm. In order to stay competitive with Singapore and other foreign sites, Portland offered a generous subsidization package. Lyne, *supra*. Without the capability to level the playing field in this manner, the erosion of America's market share in this industry will almost certainly accelerate.

The ability to offer tax incentives is often crucial to individual States' ability to retain the presence of multinational corporations or capture their expansion projects. *See, e.g.*, *Hearings* (testimony of Michele R. Kuhrt) ("State tax incentives, like the Ohio manufacturer's tax credit, in many cases are a critical factor for [multinational] companies . . . to construct new facilities, buy new equipment, and hire additional workers."); *id.* (testimony of Bruce Johnson) (testifying that incentives must be made available to manufacturers because "[t]hey have a choice of locations. They could locate either in Indiana, Illinois—China, or Taiwan, for that matter"); *see also* Robert Westervelt, *Inducements Bear Fruit in Eastern Gulf Region*, Chemical Week, Apr. 15, 1997, at 27 (quoting global chemical company executive, stating "[t]here's a battle among competing sites within the company . . . as to whether to invest in Europe, North America, or elsewhere). In May 2005, Michele R. Kuhrt, Director of Taxes and Financial Administration for the Lincoln Electric Company, testified before a House subcommittee that her company has a presence in Ohio, Georgia, California, and twenty-six international locations, and that "taxes are a significant and sometimes deciding factor on where we locate our capital." *Hearings* (testimony of Michele R. Kuhrt). Kuhrt testified that "the economic factors present in many of the other jurisdictions can make an investment decision to locate outside the United States overwhelming," but the Ohio credit invalidated

by the Sixth Circuit was an "important benefit" to the company, "one that has 'tipped the scales' in several investment evaluations." *Id.*

States use incentives, not only to compete internationally for economic investment, but to target investment in economically depressed areas. For example, in August 2005, the State of New York enacted an economic stimulus program designed to encourage businesses to return to lower Manhattan, S.B. 5930, 228th Ann. Leg. Sess. (N.Y. 2005), an area still reeling in many ways four years after the terrorist attack on the World Trade Center, *see, e.g.*, Charisse Jones, *Lower Manhattan Still on the Rebound After 9/11*, U.S.A. Today, Oct. 14, 2005, at 5A. Within eight weeks of the bill's enactment, Goldman Sachs and American Express made commitments to locate in lower Manhattan, and negotiations were underway with several other firms. *See* Press Release, Sheldon Silver, Speaker of the Assembly, Oct. 24, 2005, *available at* http://assembly.state.ny.us/Press/20051024/.

Alabama has effectively used targeted subsidization to revitalize the State's "Black Belt," an impoverished region in south-central Alabama known for its dark prairie soil.[4] The region is famously known for having "the richest soil and the poorest people" in the United States. Arthur Raper, *Preface to Peasantry* (1936). As of the 2000 U.S. Census, eight of the twelve counties that make up the Black Belt were among the 100 poorest counties in the United States. John Archibald & Jeff Hansen, *Life is Short, Prosperity is Long Gone*, Birmingham News, May 12, 2002. With its poverty, poor education, infant mortality, and unemployment, "[i]t is, according to statistical measures and the people who struggle to improve life in the

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[4] The Black Belt is so named for its dark prairie soil. It is a swath of land that stretches roughly from Columbus, Georgia to Columbus, Mississippi through the center of Alabama, including the towns of Tuskegee, Selma, Demopolis, and Eutaw. *See, e.g.*, *Kelley v. Bennett*, 96 F. Supp. 2d 1301, 1309 n.11 (M.D. Ala. 2000).

region, Alabama's Third World." *Id.* It is a place "where doctors and hospitals are so scarce that pregnant women and sick residents must travel up to 30 miles to the nearest health clinic . . . where there is no local bus service, where as many as a quarter of all households have no car . . . where infant death rates during parts of the 1990s surpassed those in Panama and Uruguay . . . [and where] the percentage of births to teenage mothers was higher than Uganda and Indonesia." *Id.*

Through targeted tax incentives, Alabama is gradually changing the Black Belt and breaking this cycle of poverty. Thanks to tax incentives offered by the State, several automakers have opened factories in and around the region. The automakers themselves, along with auto-parts suppliers that have leveraged proximity to the plants to increase profits, are reducing unemployment and rekindling hope. *See, e.g.*, Thomas Spencer, *Hyundai Helps Jobless Rate in Black Belt*, Birmingham News, Aug. 21, 2005, at C1; David Irvin, *Selma Says Hallelujah Hanil E-Hwa*, Montgomery Advertiser, Aug. 13, 2005, at A1 (reporting first-tier Hyundai supplier's decision to locate in Selma, Alabama, and quoting Alabama Governor Bob Riley, stating "[t]here's greater economic hope in the Black Belt today because more industries are locating here and the unemployment rates are down"). The region's average unemployment rate, in double digits a year ago, had fallen to eight percent by June 2005. Spencer, *supra*, at C1.

Because of Alabama's commitment to revitalizing the Black Belt, and similar incentive programs offered by other States, some foreign competitors have been less successful in attracting new investment in the auto manufacturing industry. Ontario, Canada, one of America's chief competitors in the industry, has been losing market share over the last several years due to its reluctance to match subsidy packages offered by Alabama and other States. *See, e.g.*, Napier-Chaisson, *supra* (quoting Jim Padilla, Ford Motor Co. executive, stating that Ontario needed to "step up" in order for it to consider locating a

new manufacturing plant in Oakville, Ontario); *id.* (noting that, in 2003, DaimlerChrysler met with Ontario and Canadian officials to discuss whether $300 million in assistance would be available for a new plant in Windsor, Ontario).

In 2002, a group of mayors in Ontario organized to lobby their national and provincial governments to aggressively respond to American incentive packages (the "Ontario Mayors"). In an October 2002 letter to the Canadian Minister of Industry and the Ontarian Minister of Enterprise, Innovation and Opportunity, the mayors asserted that "[t]he lack of an aggressive automotive policy over the past 13 years in Canada/Ontario has coincided with no new assembly plants here and an explosion of auto assembly plants in the US South and Mexico." Letter, Ontario Mayors for Automotive Investment, at 3, *available at* http://www.city.windsor.on.ca/home/letter.pdf. The Ontario Mayors urged their governments to "re-establish Ontario and Canada as one of the top jurisdictions in the world for automotive investment" through support packages that are "material, definitive and competitive." *Id.*, at 3-4; *see also* Report from the Econ. Dev. & Tourism Servs. Dep't re: Automotive Manufacturing Initiatives, Mar. 14, 2005, http://www.catharines.com/cityservices/citydepartments /corpsupportsvcs/Agendas_Minutes/docs/Minutes /05gmmar21.pdf (discussing continuing activities of Ontario Mayors and Canadian Automotive Partnership Council and possibility of Toyota locating a new manufacturing facility in Niagara).

Investment tax incentives, such as the tax credit invalidated by the lower court, enhance substantially the States' ability to compete globally for economic investment and to revitalize economically blighted areas. An affirmance of the decision below would therefore almost assuredly reduce America's market share in a number of industries.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

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Supreme Court, U.S.
FILED
DEC 2 - 2005
OFFICE OF THE CLERK

21 17

Nos. 04-1704 & 04-1724

IN THE
SUPREME COURT OF THE UNITED STATES

DAIMLERCHRYSLER CORPORATION, *PETITIONER*
v.
CHARLOTTE CUNO, ET AL., *RESPONDENTS*

WILLIAM W. WILKINS, TAX COMMISSIONER
FOR THE STATE OF OHIO, *PETITIONER*
v.
CHARLOTTE CUNO, ET AL., *RESPONDENTS*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondents have standing to bring this action to enjoin enforcement of the provision of Ohio law that allows an investment tax credit against the State's corporate franchise tax.

2. Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art I, § 8, cl.3.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company ("Ford") is a publicly-held corporation. Ford has no parent corporation, and there is no publicly-held corporation that owns 10% or more of Ford's stock.

General Motors Corporation ("GM") is a publicly-held corporation. GM has no parent corporation, and there is no publicly-held corporation that owns 10% or more of GM's stock.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONERS

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of Ford Motor Company and General Motors Corporation as *amici curiae* in support of petitioners.[1]

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[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICI CURIAE*

1. *The Merits Of This Case Address A Matter Of Substantial Economic Importance To Amici.*

The *amici curiae* are corporations engaged in capital intensive business activities. These activities include, in particular, the manufacture and sale of automobiles and trucks in the United States and in worldwide markets. In the course of these commercial activities, the *amici* make significant capital investments in States such as Michigan and Ohio and also make large investments in foreign locations. In planning these capital investments, the *amici* necessarily consider commercial factors such as the availability of skilled labor and the relative costs of constructing and operating facilities in different locations. The local tax structures and local tax rates that apply to manufacturing operations are among the many significant cost factors that are considered in selecting the location for such facilities.

The *amici* operate manufacturing facilities in several States that possess investment tax credit provisions that are similar or identical to those addressed in this case. For example, *amicus* Ford Motor Company currently employs more than 14,000 people in the State of Ohio and more than 66,000 people in the State of Michigan, and has made more than $11 billion of capital expenditures in these States over the last five years. In addition, during the last five years, Ford has made over $4 billion of capital expenditures in other States that have similar or identical tax credit provisions.

Amicus General Motors Corporation currently employs more than 20,000 people in Ohio and more than 75,000 people in Michigan, and has made over $12 billion of capital expenditures in these States in the last five years.

Throughout the Nation as a whole, in other States that have tax credit provisions similar to those at issue in this case, General Motors has invested more than $3 billion in the construction or expansion of manufacturing facilities within the last five years.

In the current conditions of the world economy, the ability of state and local governments to provide tax credits to facilitate the location and expansion of manufacturing activity within their borders is a matter of great importance.[2] The availability of such tax credits allows the States to provide a more level playing field for American manufacturing in worldwide markets. And, the availability of these credits also thereby assists employers such as the *amici* in their efforts to provide employment opportunities, and the economic benefits of employment, in those locations.

2. *The Standing Question Is A Matter Of Recurring Importance To Amici, And Was Raised By Them In The Court Below.*

In the district court, respondents took the position that this action should be remanded to state court because, as they frankly acknowledged, "there are substantial doubts about their ability to satisfy either the constitutional or the prudential limitations on standing" and, in particular, because there is a "serious argument that [they] fail to meet the * * * rigorous Article III tests for citizen/taxpayer standing." Resp. Supp. Motion for Remand (filed June 12, 2000), at 13, 14.

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[2] Respondents acknowledged in their Complaint that the "purpose" and the actual "effect" of state investment tax credits is to influence the investment location decisions of capital intensive businesses. Complaint ¶ 22.

The district court denied the motion to remand on the grounds that the respondents include "taxpayers [who] have standing to object to the property tax exemption and franchise tax credit statutes under the 'municipal taxpayer standing' rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447 (1923)." Order of November 20, 2000, at 6-7. The court of appeals did not address whether respondents satisfied the constitutional standing requirements in this case. In granting the petition for a writ of certiorari, however, this Court directed the parties to address that standing issue.

The *amici* are often parties to tax agreements and to tax determinations made by official government representatives, and the *amici* routinely make substantial investments in reliance upon such official tax determinations. Whether third parties (such as respondents) have standing to attempt to unsettle tax determinations made by a State that concern the taxes owed by other parties (such as DaimlerChrysler) is thus a question of recurring importance to the *amici*. The *amici* therefore argued at the rehearing stage in the court below that, under this Court's settled decisions, respondents lack standing to challenge the application of the Ohio investment tax credit in this case. For these reasons, and also because this standing requirement is jurisdictional, the *amici* will also address this issue in this brief.

SUMMARY OF ARGUMENT

I. None of respondents has standing to bring this action to enjoin enforcement of the Ohio investment tax credit. The first group of respondents (the "Ohio Plaintiffs") base their claim of standing solely on their status as residents and taxpayers in Ohio. The only injury they claim is that the investment tax credit "depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments." Complaint ¶ 40. This Court rejected that exact claim of "state

taxpayer" standing in *Doremus v. Board of Education*, 342 U.S. 429, 433-434 (1952), holding that this asserted harm is "too indeterminable, remote, uncertain and indirect" to suffice. The claim of injury by a state taxpayer does not satisfy the constitutional minimum for standing because it asserts nothing more than a remote and hypothetical harm suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

The second group of respondents (the "Michigan Plaintiffs") assert that they have standing due to their status as residents and taxpayers of Michigan. They claim that, if DaimlerChrysler had not been induced by the Ohio investment tax credit to refurbish its facility in Ohio, the company might instead have chosen to relocate that facility to Michigan which, in turn, might have benefited the Michigan plaintiffs by adding additional tax revenues and job opportunities in Michigan. These generalized and indefinite claims of injury by the Michigan Plaintiffs are even more "remote" and "speculative" than those of the Ohio Plaintiffs, and they fail to establish standing for the same reasons.

Moreover, even if the generalized allegations of the Michigan Plaintiffs were otherwise sufficient, they would fail under the separate requirement of the standing doctrine that the plaintiff must establish that a favorable court decision would "redress" the claimed injury. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury alleged by the Michigan Plaintiffs (and by the separate Ohio respondent named Kim's Auto & Truck Service, Inc.) is directly and exclusively the consequence of the location of the DaimlerChrysler facility in Ohio. That injury could be "redressed" only by a court order that would enjoin or prevent the location of the DaimlerChrysler plant in Ohio. Respondents have acknowledged, however, that the

DaimlerChrysler facility in Ohio was in fact completed in 2000 – even before the complaint in this case was filed – and that petitioner has been continuously producing vehicles at that location since that time. See *Kim's Auto & Truck Service, Inc. v. City of Toledo*, Pet. No. 03-1629, at 4-5, cert. denied, 125 S.Ct. 2988 (2005). Recognizing that the plant has already been completed, respondents did not seek to enjoin the location of the DaimlerChrysler facility in Ohio.

There is no basis for any claim – and no claim has been made – that granting the requested injunction against the Ohio tax credit would cause the completed DaimlerChrysler facility in Ohio to be bulldozed and rebuilt at some different location in some other State. There is thus plainly no "substantial likelihood" that the relief requested would redress the injury claimed by the Michigan Plaintiffs or by Kim's Auto. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 75 n.20 (1978). Because their claims of injury would not be "redressed" by the relief they seek, they lack standing to challenge the state tax credit in this case. *Ibid.*

II. If the Court reaches the merits, it should conclude that the Ohio investment tax credit does not violate the requirements of the dormant Commerce Clause. This Court has held that any State may "compete with other States for a share of interstate commerce" so long as it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-337 (1977). The investment tax credit offered by Ohio serves as an inducement to all taxpayers to make new business investment in Ohio, and it does so without imposing any additional tax burden on those taxpayers that choose to invest elsewhere. The Ohio provision is constitutionally permissible because it provides incentives for local economic